RESERVATIONS TO TREATIES

[Agenda item 3]

DOCUMENT A/CN.4/616

Reservations to treaties in the context of succession of States: memorandum by the Secretariat

[*Original: French*]
[*6 May 2009*]

CONTENTS

Multilateral instruments cited in the present report

	Source
Special Protocol concerning Statelessness (The Hague, 12 April 1930)	United Nations, *Laws concerning nationality* (ST/LEG/SER.B/4) (United Nations publications, Sales No. 1954.V.1), New York, 1954, p. 577.
Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948)	United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277.
Geneva Conventions for the protection of war victims (Geneva, 12 August 1949)	*Ibid.* vol. 75, Nos. 970–973, pp. 31 *et seq.*
Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field	*Ibid.*, No. 970, p. 31.
Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea	*Ibid.*, No. 971, p. 85.
Geneva Convention relative to the Treatment of Prisoners of War	*Ibid.*, No. 972, p. 135.
Geneva Convention relative to the Protection of Civilian Persons in Time of War	*Ibid.*, No. 973, p. 287.
Convention relating to the Status of Refugees (Geneva, 28 July 1951)	*Ibid.*, vol. 189, No. 2545, p. 137.
International Convention on the Elimination of All Forms of Racial Discrimination (New York, 21 December 1965)	*Ibid.*, vol. 660, No. 9464, p. 195.
Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)	*Ibid.*, vol. 1155, No. 18232, p. 331.
Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978)	*Ibid.*, vol. 1946, No. 33356, p. 3.
Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986)	A/CONF.129/15.

Works cited in the present report

Bokor-Szegö, Hanna

New States and International Law. Budapest, Akadémiai Kiadó, 1970. 116 p.

Caflisch, Lucius

"La pratique suisse en matière de droit international public 1996" (chronique), *Revue suisse de droit international et de droit européen*, vol. 7, 1997, pp. 637–707.

Gaja, Giorgio

"Reservations to treaties and the newly independent States", *Italian Yearbook of International Law*, vol. 1, 1975, pp. 52–68.

Gonçalves Pereira, André

La succession d'États en matière de traité. Paris, Pedone, 1969. 232 p.

Imbert, Pierre-Henri

Les réserves aux traités multilatéraux: Évolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951. Paris, Pedone, 1979. 503 p.

Klabbers, Jan

"State succession and reservations to treaties", in Jan Klabbers and René Lefeber, eds., *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*. The Hague, Martinus Nijhoff, 1998, pp. 107–120.

Marcoff, Marco G.

Accession à l'indépendance et succession d'États aux traités internationaux. Fribourg, Editions universitaires, 1969. 388 p.

Menon, P. K.

"The newly independent States and succession in respect of treaties". *Korean Journal of Comparative Law*, vol. 18, 1990, pp. 139–173.

Mikulka, Václav

"The dissolution of Czechoslovakia and succession in respect of treaties", in Mojmir Mrak, ed., *Succession of States*. The Hague, Martinus Nijhoff, 1999, pp. 100–125.

O'Connell, Daniel Patrick

State Succession in Municipal Law and International Law. Cambridge Studies in International and Comparative Law, VII, vol. II: International relations. Cambridge, Cambridge University Press, 1967. 592 p.

Ruda, José María

"Reservations to treaties", *Collected Courses of The Hague Academy of International Law, 1975–III*, vol. 146. The Hague, Martinus Nijhoff, 1975, pp. 95–218.

Szafarz, Renata

"Vienna Convention on Succession of States in respect of Treaties: a general analysis", *Polish Yearbook of International Law*, vol. X, 1979–1980, pp. 77–113.

Zemanek, Karl

"State succession after decolonization", *Collected Courses of The Hague Academy of International Law, 1965–III*, vol. 116. The Hague, Martinus Nijhoff, 1965, pp. 181–300.

Introduction

1. The Vienna Convention on the Law of Treaties, of 23 May 1969 (hereinafter "the 1969 Vienna Convention"), does not address the question of succession of States in respect of treaties. In fact, article 73 of that Convention contains a safeguard clause stipulating that "the provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States …". A similar safeguard clause appears in article 74, paragraph 1, of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 21 March 1986 (hereinafter "the 1986 Vienna Convention").[1]

2. The Vienna Convention on Succession of States in respect of Treaties (hereinafter "the 1978 Vienna Convention"), lays down, in article 20, rules concerning reservations in the context of succession of States. However, this provision applies only to the case of a "newly independent State", meaning, according to the definition set out in article 2, paragraph 1 (*f*), of the Convention, "… a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible". Thus, the rules governing reservations, as set out in the 1978 Vienna Convention, cover only cases of succession in which a State gains independence as a result of a decolonization process; this also includes new States whose territories had previously been under the mandate and/or trusteeship system. It should be noted, moreover, that the Convention contains no provisions on objections to reservations.

[1] This Convention is not yet in force.

3. The present study is divided into two chapters.

4. Chapter I provides an overview of the rules laid down in article 20 of the 1978 Vienna Convention, taking account of the debates held at the United Nations Conference on Succession of States in Respect of Treaties, 1977–1978, and of the work done prior to the Conference by the Commission. Some questions that are left unresolved by the 1978 Vienna Convention are also discussed.

5. Chapter II of the study reviews the practice in relation to reservations and objections to reservations in the context of succession of States. The practice in relation to treaties for which the Secretary-General of the United Nations serves as depositary is considered first. Some elements of the practice in relation to other treaties are then mentioned. This review also takes into account the replies to the two questionnaires which the Special Rapporteur addressed to States and to international organizations, respectively, in 1999.[2] It should be stated at the outset, however, that the vast majority of States or international organizations (34 in all) that replied to the questionnaires did not provide any information on their practice in this regard.

[2] Questionnaires prepared by the Special Rapporteur on reservations to treaties pursuant to paragraph 489 of the report of the International Law Commission on the work of its forty-seventh session (*Yearbook ... 1995*, vol. II (Part Two)), p. 108). For the text of the questionnaires, see *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annexes II and III, pp. 97 and 107.

Chapter I

The rules of the 1978 Vienna Convention

A. The case of newly independent States

6. In contrast to cases involving the uniting or separation of States, which are governed by the provisions of part IV of the 1978 Vienna Convention, the basic rule laid down in part III of the Convention with regard to newly independent States is that of "non-succession", i.e. the absence of automatic devolution to the newly independent State of treaties by which the predecessor State was bound. Nonetheless, the newly independent State may voluntarily notify its succession to any such treaty.

7. It is on this premise that article 20 of the 1978 Vienna Convention sets out rules on reservations to treaties in the context of succession to a treaty by a newly independent State. Except for a few minor differences in the wording, this provision mirrors draft article 19 adopted by the Commission at its twenty-sixth session, in 1974.[3]

[3] The text of the draft articles on succession of States in respect of treaties, with commentary, is reproduced in *Yearbook ... 1974*, vol. II (Part One), pp. 174 *et seq.*, para. 85.

1. Status of reservations formulated by the predecessor State

(a) *Presumption in favour of the maintenance of reservations*

8. Article 20, paragraph 1, of the 1978 Vienna Convention establishes, in the case of silence on the part of a newly independent State in its notification of succession, a presumption that it is maintaining any reservation formulated by the predecessor State which was applicable at the date of the succession of States in respect of the territory to which the succession relates.[4] This presumption

[4] This paragraph provides as follows: "When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 17 or 18, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation."

is reversed, however, if the successor State expresses a "contrary intention" when making the notification of succession or if, at the same time, it formulates a reservation "which relates to the same subject matter".

9. The presumption in favour of the maintenance of reservations formulated by the predecessor State had already been proposed by D. P. O'Connell, Rapporteur of the International Law Association on the subject of "the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors".[5] It had also been proposed at the outset by the Commission's first Special Rapporteur on the succession of States in respect of treaties, Sir Humphrey Waldock, who based his considerations, in particular, on a concern for respecting the actual intention of the successor State by avoiding the creation of an irreversible situation[6] and on a number of elements of practice that seemed to support such a presumption.[7] The second Special Rapporteur on the subject, Sir Francis Vallat, also supported the presumption in favour of the maintenance of reservations formulated by the predecessor State, despite the contrary view of a number of Governments, which had recommended the reversal of this presumption.[8]

10. A majority of the members of the Commission shared the view of the two Special Rapporteurs, and the commentary to article 19 as finally adopted by the Commission contains the following arguments supporting the presumption in favour of the maintenance of reservations formulated by the predecessor State:

> First, the presumption of an intention to maintain the reservations was indicated by the very concept of succession to the predecessor's treaties. Secondly, a State is in general not to be understood as having undertaken more onerous obligations unless it has unmistakably indicated an intention to do so; and to treat a newly independent State, on the basis of its mere silence, as having dropped its predecessor's reservations would be to impose upon it a more onerous obligation. Thirdly, if presumption in favour of maintaining reservations were not to be made, the actual intention of the newly independent State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the newly independent State's intention, the latter could always redress the matter by withdrawing the reservations.[9]

11. At the United Nations Conference on Succession of States in Respect of Treaties of 1977–1978, the representative of the United Republic of Tanzania had proposed an amendment to reverse the presumption in favour of the maintenance of reservations formulated by the predecessor State. The wording of that amendment provided that the successor State was considered as discontinuing any reservations formulated by the predecessor State unless it expressed a contrary intention.[10] The representative of the United Republic of Tanzania expressed a preference for a "clean slate" in regard to reservations and pointed out that reservations formulated by the predecessor State were not necessarily in the interest of the successor State.[11] The amendment was rejected, however, by 26 votes to 14, with 41 abstentions,[12] and the presumption in favour of the maintenance of reservations was retained in the final text of article 20 as adopted at the Conference.[13]

12. This presumption is inferred logically, since succession to a treaty by a newly independent State, though voluntary, is a true succession that must be distinguished from accession. Because it is a succession, it seems reasonable to presume that treaty obligations are transmitted to the successor State as modified by the reservation formulated by the predecessor State.

---

[5] See *Yearbook ... 1969*, vol. II, p. 49, para. 17, "additional point" No. 10: "A successor State can continue only the legal situation brought about as a result of its predecessor's signature or ratification. Since a reservation delimits that legal situation it follows that the treaty is succeeded to (if at all) with the reservation."

[6] The Special Rapporteur indicated, in this regard, that "… if a presumption in favour of maintaining reservations were not to be made, the actual intention of the successor State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the successor State's intention, the latter could always redress the matter by withdrawing the reservations" (*Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 50).

This reasoning has been criticized in the literature. See, in particular, Imbert, *Les réserves aux traités multilatéraux: Évolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951*, p. 309; the author considers that "there is no reason to think that the State would not study the text of the convention carefully enough to know exactly which reservations it wished to maintain, abandon or formulate".

[7] *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, pp. 47–49.

[8] *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, pp. 52–54.

[9] *Ibid.*, p. 226, para. (17). One author has nonetheless questioned the soundness of these explanations, casting doubt in particular on the assumption that the predecessor State's reservations would be "necessarily advantageous to the newly independent State"; Imbert, *op. cit.* (footnote 6 above), p. 310. The author also suggests that "since reservations constitute derogations from or limitations on a State's commitments, they should not be a matter of presumption. On the contrary, it makes more sense to assume that, in the absence of a formal statement of its intention, a State is bound by the treaty as a whole".

[10] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties. Vienna, 4 April–6 May 1977 and 31 July–23 August 1978*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* [1977 session], A/CONF.80/16, United Nations publication, Sales No. 78.V.8, 28th meeting, para. 37; and A/CONF.80/14, para. 118 (*c*) (reproduced in *Documents of the Conference*, A/CONF.80/16/Add.2, United Nations publication, Sales No. E.79.V.10 (hereinafter A/CONF.80/16/Add.2)). A preference for the opposite presumption had also been expressed by other delegations; see A/CONF.80/16, 28th meeting, para. 13 (Romania), para. 18 (India) and para. 33 (Kenya).

[11] A/CONF.80/16, 27th meeting, para. 79.

[12] *Ibid.*, 28th meeting, para. 41.

[13] While the presumption in favour of the maintenance of the predecessor State's reservations has been criticized in the literature (see, in particular, Imbert, *op. cit.* (footnote 6 above), pp. 307–318), a number of authors have supported this presumption; see O'Connell, *State Succession in Municipal Law and International Law*, p. 229, which states: "Since a State which makes a reservation to a multilateral convention commits itself only to the convention as so reserved, its successor State cannot, logically, succeed to the convention without reservations. Should the reservation be unacceptable to it the appropriate procedure would be to ask the depositary to remove it and notify all parties accordingly. It might be objected that to this extent the new State is becoming a party to new commitments without acceding, but in practice this is not likely to prove a difficulty, except in respect of close conventions" (note omitted). See also Gaja, "Reservations to treaties and the newly independent States", pp. 54–56 (the author states, in particular: "The opinion that the predecessor State's reservations are maintained is also based on the reasonable assumption that when a newly independent State elects to become a party to a treaty by means of a notification of succession, in principle it wants the treaty to continue to be applied to its territory in the same way as it did before independence" (p. 55)); Ruda, "Reservations to treaties", p. 206 ("… the solution given by the ILC seems to be more acceptable, in the absence of any clear existing customary rule or practice, because it affords better protection for the interests of the successor State"); also Menon, "The newly independent States and succession in respect of treaties", p. 152.

(b) *Formulation of a "reservation which relates to the same subject matter"*

13. The presumption in favour of the maintenance of reservations formulated by the predecessor State is reversed, under article 20, paragraph 1, of the 1978 Vienna Convention not only if a "contrary intention" is specifically expressed by the successor State when making the notification of succession, but also if that State formulates a reservation "which relates to the same subject matter" as the reservation formulated by the predecessor State. The exact wording of this second possibility was a subject of debate in the Commission.

14. Sir Humphrey Waldock had proposed, in his third report, a different formulation that provided for the reversal of the presumption that the predecessor State's reservations were maintained if the successor State formulated "reservations different from those applicable … at the date of succession".[14]

15. In its draft article 15 provisionally adopted in 1972, the Commission had settled on a solution according to which the presumption that the predecessor State's reservations were maintained was reversed if the successor State formulated a new reservation "which relates to the same subject matter and is incompatible with [the reservation formulated by the predecessor State]".[15] However, in response to comments from some Governments, the Commission decided to delete, in its final draft article, the reference to the test of "incompatibility", which "might be difficult to apply"; the commentary to draft article 19 merely pointed out that "if the newly independent State were to formulate a reservation relating to the same subject-matter as that of the reservation made by the predecessor State, it could reasonably be presumed to intend to withdraw that reservation".[16]

16. The wording that was finally adopted by the Commission and reflected in the 1978 Vienna Convention has been criticized in the literature for omitting the test of "incompatibility" between a reservation formulated by the predecessor State and one formulated by the successor State.[17]

2. New reservations formulated by a successor State that is a newly independent State

17. Article 20, paragraph 2, of the 1978 Vienna Convention establishes that a successor State that is a newly independent State may formulate, when making a notification of succession, reservations that are not excluded by the provisions of subparagraphs (*a*), (*b*) or (*c*) of article 19 of the 1969 Vienna Convention.[18] Article 20, paragraph 3, of the 1978 Vienna Convention provides, further, that the rules set out in articles 20 to 23 of the 1969 Vienna Convention apply in respect of reservations formulated by a newly independent State in its notification of succession.[19]

18. As the Commission had noted in its commentary to draft article 19,[20] the existence of this capacity seems to have been confirmed in practice, including the practice regarding cases of succession to multilateral treaties for which the Secretary-General of the United Nations serves as depositary.[21] In his third report, the first Special Rapporteur, Sir Humphrey Waldock, based his views *inter alia* on the practice of the Secretary-General, who, on several occasions, seemed to have acknowledged that newly independent States have this capacity, without prompting any objections from States to this assumption.[22] The second Special Rapporteur was also in favour, for "practical" reasons, of acknowledging the right of a newly independent State to make new reservations when notifying its succession.[23]

19. The view of the two Special Rapporteurs prevailed in the Commission, which, as indicated in the commentary to draft article 19 as finally adopted, had a choice between two alternatives: "(*a*) to decline to regard any notification of succession made subject to new reservations as a true instrument of succession and to treat it in law as a case of accession, or (*b*) to accept it as having the character of a succession but at the same time apply to it the law governing reservations as if it were a wholly new expression of consent to be bound by the treaty".[24] Drawing upon the practice of the Secretary-General and wishing to take a "flexible" approach in this regard, the Commission opted for the second alternative, noting also that it might ease the access of a newly independent State to a treaty that was not, "… for technical reasons, open to its participation by any other procedure than succession".[25]

20. At the United Nations Conference on Succession of States in Respect of Treaties of 1977–1978, the Austrian delegation had proposed the deletion of paragraphs 2 and 3 of the provision that would become article 20 of the 1978 Vienna Convention.[26] That delegation considered that recognizing the capacity of a newly independent State to formulate new reservations when notifying its succession "seemed to be based on an erroneous concept of succession".[27] In the Austrian delegation's view, "[i]f a newly independent State wished to make reservations, it should use the ratification or accession procedure provided

[14] *Yearbook ... 1970*, vol. II, p. 47.

[15] *Yearbook ... 1972*, vol. II, p. 260.

[16] *Yearbook ... 1974*, vol. II (Part One), p. 226, para. (18). The removal of the reference to the test of "incompatibility" had been supported by the second Special Rapporteur (*ibid.*, pp. 53–54).

[17] See Gaja, *loc. cit.* (footnote 13 above) pp. 59–60.

[18] Article 20, paragraph 2, of the 1978 Vienna Convention provides as follows: "When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 17 or 18, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of subparagraph (*a*), (*b*) or (*c*) of article 19 of the Vienna Convention on the Law of Treaties."

[19] Article 20, paragraph 3, of the 1978 Vienna Convention provides as follows: "When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20 to 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation."

[20] *Yearbook ... 1974*, vol. II (Part One), pp. 224–225, paras. (7)–(12).

[21] See chapter II, section A, below.

[22] *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, pp. 48–50.

[23] *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, p. 54, paras. 291–294.

[24] Commentary to draft article 19, *Yearbook ... 1974*, vol. II (Part One), p. 227, para. (20).

[25] *Ibid.*

[26] A/CONF.80/16, 27th meeting, paras. 59–64.

[27] *Ibid.*, para. 60.

for becoming a party to a multilateral treaty".[28] However, the Austrian amendment was rejected by 39 votes to 4, with 36 abstentions.[29]

21. The delegations which, at the United Nations Conference on Succession of States in Respect of Treaties, had opposed the Austrian amendment had put forth various arguments, including the desirability of ensuring that the newly independent State would "not be obliged to conform with more complicated ratification procedures than those provided for by the International Law Commission",[30] the alleged incompatibility of the Austrian amendment with the principle of self-determination[31] or the principle of the "clean slate",[32] the need to be "realistic" rather than "puristic",[33] and the fact that a succession of States was not "a legal inheritance or a transmission of rights and obligations".[34]

22. While it has been criticized in the literature,[35] a newly independent State's capacity to formulate reservations when notifying its succession to a treaty is expressly acknowledged by some authors.[36] The recognition of this capacity may be considered a "pragmatic" solution that takes account of the "non-automatic", i.e. voluntary, nature of succession to treaties on the part of newly independent States.

23. However, a newly independent State's capacity to formulate reservations to a treaty to which it intends to succeed ought not to be unlimited over time. It seems reasonable to consider that a newly independent State should exercise this capacity when notifying its succession and that reservations formulated after that date should be subject to the legal regime for late reservations, as set out in draft guidelines 2.3.1, 2.3.2, 2.3.3 and 2.3.5 provisionally adopted so far by the Commission.[37]

3. Questions not covered by the Convention

(a) *Other types of declarations*

24. Article 20 of the 1978 Vienna Convention exclusively governs the issue of reservations.

25. At the United Nations Conference on Succession of States in Respect of Treaties, the delegation of the Federal Republic of Germany had proposed an amendment broadening the scope of this provision. The amendment would have prefaced the rules on reservations, as proposed by the Commission, with the indication that "… any statement or instrument made in respect to the treaty in connexion with its conclusion or signature by the predecessor State, shall remain effective for the newly independent State".[38] The delegation of the Federal Republic of Germany subsequently withdrew this proposed amendment, to which a number of delegations had objected for various reasons.[39]

(b) *Objections to reservations*

26. The 1978 Vienna Convention does not cover the issue of objections to reservations in the context of succession of States.[40] Despite a request to that effect from the representative of the Netherlands[41] and despite the concerns expressed,[42] the United Nations Conference on Succession of States in Respect of Treaties provided no solution to this question.

(i) *Status of objections formulated by the predecessor State*

27. More specifically with respect to the status of objections formulated by the predecessor State, the fact that the 1978 Vienna Convention is silent on this point seems to leave a gap, as the 1969 Vienna Convention does not deal with this issue either.[43]

---

[28] *Ibid.*, see also 28th meeting, para. 30.

[29] A/CONF.80/16, 28th meeting, para. 40.

[30] *Ibid.*, 27th meeting, para. 71 (Netherlands).

[31] *Ibid.*, para. 73 *in fine* (Algeria) and para. 89 (Guyana).

[32] *Ibid.*, para. 85 (Madagascar).

[33] *Ibid.*, para. 77 (Poland).

[34] *Ibid.*, 28th meeting, para. 7 (Israel). The representative of Israel went on to say: "A newly independent State … would simply have the right of option to establish itself as a separate party to the treaty in virtue of the legal nexus established by its predecessor. Its right was to notify its own consent to be considered as a separate party to the treaty; that was not a right to step into the predecessor's shoes. The significance of article 19 was that a newly independent State should be 'considered' as maintaining its succession to the treaty. In other words, notification of succession was an independent act of the successor State's own volition."

[35] See Zemanek, "State succession after decolonization", pp. 234–235; Gonçalves Pereira, *La succession d'États en matière de traité*, pp. 175–176, footnote 50; and Bokor-Szegö, *New States and International Law*, p. 100, cited by Gaja, *loc. cit.* (footnote 13 above), p. 61, footnote 39.

[36] See Marcoff, *Accession à l'indépendance et succession d'États aux traités internationaux*, p. 346. According to the author, "The right to make reservations is not a right that is transmissible through inheritance, but a prerogative that is part of the set of supreme powers attributed by virtue of the protective principle to sovereign States"; the author further considers that "[t]he institution of State succession is not incompatible with the exercise of the right to make reservations insofar as it is recognized under general international law". See also Gaja, *loc. cit.* (footnote 13 above), pp. 60–65, and Ruda, *loc. cit.* (footnote 13 above), p. 206.

[37] See the report of the Commission on the work of its sixtieth session, 5 May–6 June and 7 July–8 August 2008, *Yearbook … 2008*, vol. II (Part Two), para. 123.

[38] A/CONF.80/16, 28th meeting; and A/CONF.80/14, para. 118 (*b*) (reproduced in *Documents of the Conference*, A/CONF.80/16/Add.2).

[39] A/CONF.80/16, 27th meeting, para. 73 (Algeria, which considered that the proposed amendment seemed to bring the principle of self-determination into question); para. 78 (Poland, which believed that the amendment was not sufficiently clear); para. 87 (Madagascar, which felt that the wording of the amendment was "much too broad in scope"); para. 90 (Guyana); and para. 95 (Italy, which found the wording of the amendment "very strong and inflexible").

[40] At the United Nations Conference on Succession of States in Respect of Treaties, Mr. Y. Yasseen, Chairman of the Drafting Committee, explicitly raised this point; see A/CONF.80/16, 35th meeting, para. 17: "The Drafting Committee had paid particular attention to the question of objections to reservations and objections to such objections, which had been raised by the Netherlands representative. It had noted that, as was clear from the International Law Commission's commentary to article 19, particularly paragraph (15) (A/CONF.80/4, p. 66), the article did not deal with that matter, which was left to be regulated by general international law" (notes omitted). The Chairman of the Drafting Committee also stated that: "… it was clear from the wording of article 19 and the International Law Commission's commentary thereto that the question of objections to reservations should be resolved by reference to general international law. What precise solution general international law would provide, it was not within the Committee [of the Whole]'s competence to determine"; A/CONF.80/16, 35th meeting, para. 21.

[41] A/CONF.80/16, 27th meeting, para. 70; 28th meeting, para. 32; and 35th meeting, para. 19.

[42] *Ibid.*, 27th meeting, para. 85 (Madagascar).

[43] See, in this connection, Imbert, *op. cit.* (footnote 6 above), p. 320. But the author goes on to say, on the following page, that "[d]espite the absence of an express provision, it is on the presumption in favour of the maintenance of objections that article 20 [of the 1978 Vienna

28. Draft article 19, as adopted by the Commission, also did not address the question of objections to reservations in the context of succession of States. In this regard, the Commission noted, in the commentary to this draft article,

> that it would be better, in accordance with its fundamental method of approach to the draft articles, to leave these matters to be regulated by the ordinary rules applicable to acceptances and objections on the assumption that, unless it was necessary to make some particular provision in the context of the succession of States, the newly independent State would "step into the shoes of the predecessor State".[44]

29. The final words of the above-cited paragraph could imply that the Commission considered that the transmission of objections should be the rule.[45]

30. In order to justify its silence on the question of objections to reservations, the Commission invoked an argument based on the legal effects of such objections. In its commentary, the Commission noted, on the one hand, that unless the objecting State has definitely indicated that by its objection it means to stop the entry into force of the treaty as between the reserving State and the objecting State, the legal position created by an objection to a reservation is "much the same as if no objection had been lodged"; and, on the other, that if such an indication is given, the treaty will not have been in force at all between the predecessor State and the reserving State at the date of the succession.[46]

31. It should be pointed out that the first Special Rapporteur on the succession of States in respect of treaties, Sir Humphrey Waldock, while highlighting the scarcity of practice in this regard, had suggested that the rules regarding reservations should apply *mutatis mutandis* to objections.[47] In particular, this meant that the same presumption that the Commission would later incorporate into its draft article 19, paragraph 1, which was reproduced in article 20, paragraph 1, of the 1978 Vienna Convention, would apply to objections.[48] The second Special Rapporteur, Sir Francis Vallat, also supported the presumption in favour of the maintenance of objections formulated by the predecessor State, while considering that there was "no need to complicate the draft by making express provisions with respect to objections". Sir Francis was of the view, on the one hand, that "on the whole, the reasoning which supports the retention of the presumption in favour of the maintenance of reservations also supports the presumption in favour of the maintenance of objections which is inherent in the present draft"; and, on the other, that it would "always be open to the successor State to withdraw the objection if it wishes to do so".[49]

32. Given the scarcity of practice in this area,[50] it may seem difficult to give a definitive answer to the question of whether or not objections formulated by a predecessor State are transmissible to a newly independent State.[51] It should be noted, however, that the maintenance of objections formulated by the predecessor State was proposed by D.P. O'Connell, Rapporteur of the International Law Association on the subject of "the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors".[52] In addition, certain elements of recent practice, which will be discussed below, seem to support the maintenance of objections.[53]

(ii) *Formulation of objections by a successor State that is a newly independent State*

33. If the rules regarding reservations had applied *mutatis mutandis* to objections, as proposed by the first Special Rapporteur, Sir Humphrey Waldock, then a successor State could also have formulated its own objections to reservations "whether formulated before or after the date of succession", in line with the time limits set out in article 20, paragraph 5, of the 1969 Vienna Convention.[54]

34. Sir Humphrey Waldock had, however, intended to provide for an exception with respect to the treaties referred to in article 20, paragraph 2, of the 1969 Vienna Convention.[55] Such an exception was warranted, in the Special Rapporteur's view, by the fact that a reservation to a provision of such a treaty must be accepted by all States parties before the reserving State could participate in the treaty. Accordingly, the Special Rapporteur pointed out that allowing a successor State to object to a

---

Convention] is based" (note omitted). This author believes, however, that this presumption is erroneous, particularly in view of the alleged "*intuitu personae*" nature of objections.

[44] *Yearbook ... 1974*, vol. II (Part One), p. 226, para. (15); see also paragraph (23) of the commentary (p. 227). This explanation was recalled at the United Nations Conference on Succession of States in Respect of Treaties of 1977–1978 by Sir Francis Vallat, acting as an expert consultant; see A/CONF.80/16, 27th meeting, para. 83.

[45] See, in this connection, Imbert, *op. cit.* (footnote 6 above), p. 320, footnote 126.

[46] Commentary to article 19, *Yearbook ... 1974*, vol. II (Part One), p. 226, para. (14). This reasoning seems to be supported by Ruda, *loc. cit.* (footnote 13 above), pp. 207–208. See, however, the rather critical remarks of Klabbers, "State succession and reservations to treaties", pp. 109–110.

[47] The provision proposed by Sir Humphrey Waldock read as follows: "The rules laid down in paragraphs 1 and 2 regarding reservations apply also, *mutatis mutandis*, to objections to reservations" (*Yearbook ... 1970,* vol. II, p. 47).

[48] *Ibid.*, p. 51.

[49] *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, p. 54, para. 289.

[50] This scarcity of practice was noted more than 30 years ago by Gaja, *loc. cit.* (footnote 13 above), p. 56; it seems that this observation remains valid today (see chapter II below).

[51] See, on this subject, Szafarz, "Vienna Convention on Succession of States in respect of Treaties: a general analysis", p. 96. See also the considerations of Gaja, *loc. cit.* (footnote 13 above), p. 57, who takes the view that practice does not contradict the presumption in favour of the maintenance of objections formulated by the predecessor State, but also does not suffice to support this presumption.

[52] See *Yearbook ... 1969*, vol. II, p. 49, para. 17, "additional point" No. 13: "Since a new State takes over the legal situation of its predecessor, it takes over the consequences of its predecessor's objections to an incompatible reservation made to a multilateral convention by another party. Therefore the reservation would not be effective against the new State unless the latter formally waives the objection."

[53] See chapter II below.

[54] *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 52. Article 20, para. 5, of the 1969 Vienna Convention provides as follows: "for the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later".

[55] This paragraph provides as follows: "When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties."

reservation already accepted by all the parties to the treaty would have empowered that State to compel the reserving State to withdraw from the treaty.[56]

35. One author has expressly acknowledged the right of a newly independent State to formulate, when notifying its succession to a treaty, its own objections with respect to reservations formulated by other States parties.[57]

(iii) *Status of objections to reservations formulated by the predecessor State*

36. At the United Nations Conference on Succession of States in Respect of Treaties of 1977–1978, the representative of Japan indicated that he could accept the text of draft article 19, as proposed by the Commission, on the understanding, however, that "a State party which had objected to the original reservation which had been made by the predecessor State did not need to repeat the objection with regard to the successor State".[58] A similar view was expressed by the representative of the Federal Republic of Germany, who considered, with respect to both newly independent States and other successor States, that "[t]he successor State was bound *ipso jure* by the individual treaty relationship created by the predecessor State, including the reservations and other declarations made by that State *and the objections thereto entered by its treaty partners**"[59].

37. There is a divergence of views among the few authors who have considered the status of objections to reservations formulated by a predecessor State.[60] Nonetheless, it is hard to see why a State that has objected to a reservation made by a predecessor State should have to repeat the objection when the same reservation is maintained by the successor State.

(iv) *New objections to reservations maintained by a successor State that is a newly independent State*

38. Another question is whether, when a reservation formulated by a predecessor State is maintained by the successor State, the other States parties are entitled to formulate objections to that reservation which they had not formulated with regard to the predecessor State.

39. This right is explicitly denied by one author, who considers that there is no reason to allow a State party to revoke its acceptance of a reservation that applied to the territory to which the succession relates.[61]

(v) *Objections to reservations formulated by a successor State that is a newly independent State*

40. When a newly independent State, in notifying its succession to a treaty, formulates reservations which the predecessor State had not formulated, it seems logical to consider that the other States parties to the treaty have the capacity to object to those reservations under the general rules of the law of treaties.[62]

(c) *Effects* ratione temporis *of a declaration whereby a newly independent State announces, when notifying its succession to a treaty, that it is not maintaining a reservation formulated by the predecessor State*

41. Article 20 of the 1978 Vienna Convention does not directly address the effects *ratione temporis* of a declaration whereby a newly independent State announces, when notifying its succession to a treaty, that it is not maintaining a reservation formulated by the predecessor State. Neither practice nor the literature seems to provide a clear answer to this question.

42. It seems reasonable to consider that such a declaration will not become operative in relation to another contracting State until notice of it has been received by that State, in accordance with the solution reflected in article 22, paragraph 3 (*a*), of the 1969 Vienna Convention regarding the withdrawal of a reservation.

(d) *Effects* ratione temporis *of a reservation formulated by a newly in`dependent State when notifying its succession to a treaty*

43. Article 20 of the 1978 Vienna Convention does not specify the date of entry into force of a reservation formulated by a newly independent State when notifying its succession to a treaty.[63]

44. Draft article 19, as adopted by the Commission, is also silent on this issue. The Commission had decided that it would be better to leave the matter to be regulated by the ordinary rules of international law relating

[56] *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, p. 52.

[57] See Gaja, *loc. cit.* (footnote 13 above), p. 66: "The admissibility of objections on the part of newly independent States notifying succession to a treaty can be founded on the same reason given when considering the admissibility of reservations in cases in which succession depends on acceptance of the treaty by the newly independent State. This State appears to be in the same position as any acceding State, and may therefore take any action open to an acceding State with regard to other States' reservations."

[58] A/CONF.80/16, 28th meeting, paras. 15–16.

[59] *Official Records of the United Nations Conference on Succession of States in Respect of Treaties. Vienna, 4 April–6 May 1977 and 31 July–23 August 1978*, vol. II, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* [resumed session, 1978], A/CONF.80/16/Add.1, United Nations publication, Sales No. E.79.V.9 (hereinafter A/CONF.80/16/Add.1), 43rd meeting, para. 11.

[60] The view that such objections are maintained is supported by Gaja, who explains his position as follows: "Objections made to the predecessor State's reservations continue to apply in relation to the newly independent State. The objecting State obviously may withdraw its objections. If it so wishes, it may do so with regard to the newly independent State only, while maintaining the objection to a similar reservation concerning the application of the treaty to other territories" (*loc. cit.* (footnote 13 above), p. 67). *Contra*: Imbert, *op. cit.* (footnote 6 above), p. 316.

[61] Gaja, *loc. cit.* (footnote 13 above), p. 67: "When a newly independent State maintains a reservation made by its predecessor State, the other States parties to the treaty can make no new objection to the reservation because it becomes applicable to the newly independent State. This would appear to be inconsistent with the acceptance of the reservation applicable to the same territory before independence. Such acceptance cannot be revoked with regard to the predecessor State, and no special reason justifies its becoming revocable in respect of the successor State."

[62] Arts. 20–23 of the 1969 Vienna Convention. See, in this regard, Gaja, *loc. cit.* (footnote 13 above), p. 67.

[63] See, on this issue, the interpretation given at the United Nations Conference on Succession of States in Respect of Treaties of 1977–1978 by the Austrian delegation, to the effect that "any new reservation made by the new State would become effective not at the date of the succession, but at a later date in accordance with the treaty provisions" (A/CONF.80/16, 28th meeting, para. 28).

to reservations, on the understanding that a reservation could not have retroactive effect.[64] It should be noted, however, that the second Special Rapporteur, Sir Francis Vallat, had proposed the adoption of a provision governing this question, in response to a request to that effect made by the United States of America.[65] The provision proposed by Sir Francis was worded as follows: "A new reservation established under paragraphs 2 and 3 shall not have any effect before the date of the making of the notification of succession".[66]

45. The Secretary-General of the United Nations has gone so far as to consider that a reservation formulated by a newly independent State when notifying its succession should become effective on the day when it would have done so had it been formulated in an instrument of accession, i.e. after a certain amount of time had elapsed, pursuant to the treaty concerned.[67] However, one author has expressed the view that there is no reason to delay, beyond the date of the notification of succession, the effects of a reservation formulated by a newly independent State.[68]

B. Other cases of succession

46. The 1978 Vienna Convention contains no provisions on the question of reservations in cases of succession other than those leading to the creation of a newly independent State. The fact that article 20 appears in part III of the Convention shows clearly that this provision relates only to newly independent States.[69] The question therefore arises as to how the Convention's silence on this issue should be interpreted.

47. At the United Nations Conference on Succession of States in Respect of Treaties of 1977–1978, it had been suggested that, with respect to other cases of succession, a provision regulating the issue of reservations should be included.[70] The delegation of the Federal Republic of Germany proposed a new article 36 *bis* that provided in particular for the transposition, to the cases of succession referred to in part IV of the Convention, of the rules on reservations applicable to newly independent States.[71] That delegation considered that "the situation with respect to succession, as distinct from accession, was identical for the States to which Parts III and IV of the draft referred".[72]

48. The delegation of the Federal Republic of Germany nonetheless withdrew its proposed amendment after a number of delegations objected to it.[73] Those delegations considered that giving a successor State the right to formulate new reservations was inconsistent with the principle of *ipso jure* continuity of treaties set out by the Convention for cases involving the uniting or separation of States.[74] On the other hand, regarding the presumption in favour of the maintenance of reservations formulated by the predecessor State, various delegations believed that that presumption was obvious in cases involving the uniting or separation of States, bearing in mind the principle of *ipso jure* continuity of treaties, which had been reflected in the Convention in relation to these kinds of succession.[75]

49. It seems that in the light of the regime established by the 1978 Vienna Convention for cases involving the uniting or separation of States, there are serious doubts as to whether a successor State other than a newly independent

---

[64] Commentary to article 19, *Yearbook ... 1974*, vol. II (Part One), p. 227, para. (22). The Commission refers here "to the general position that a reservation can only be effective at the earliest from the date when it is made". For another view in support of non-retroactivity, see also the position expressed by Austria (footnote 63 above).

[65] In the view of the United States of America, "the Commission should eliminate these complications by making it clear that new reservations take effect when made, that is, at the date of notification of succession"; reproduced in *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6, p. 52.

[66] *Ibid.*, p. 55, para. 298.

[67] Cf. letter dated 10 October 1969 from the Secretary-General to the Government of Zambia, the relevant passage of which is cited in the Commission's commentary to draft article 19 (*Yearbook ... 1974*, vol. II (Part One), pp. 224–225, para. (10)).

[68] See Gaja, *loc. cit.* (footnote 13 above), p. 68: "The newly independent State's interest may be considered to lie in applying the treaty in the same way from the date of acceptance of the treaty. This clearly cannot have the result that reservations, or withdrawals of reservations, made after notification of succession have a retroactive effect. On the other hand, there is no apparent reason why reservations, or withdrawals of reservations, made at the time of notification of succession should not take effect at the same time as the notification" (footnotes omitted).

[69] See also, in this regard, the explanations given at the United Nations Conference on Succession of States in Respect of Treaties of 1977–1978 by Sir Francis Vallat, expert consultant, on draft article 19 adopted by the Commission (A/CONF.80/16, 27th meeting, para. 84).

[70] A/CONF.80/16, 28th meeting, para. 17 (India), which pointed out that there was a gap in the Convention and, accordingly, a need to add an article on reservations to the part of the Convention which dealt with the uniting and separation of States.

[71] A/CONF.80/16/Add.1, 43rd meeting, paras. 9–12. The amendment proposed by the Federal Republic of Germany was worded as follows:

> "1. When under articles 30, 31, 33 and 35 a treaty continues in force for a successor State or a successor State participates otherwise in a treaty not yet in force for the predecessor State, the successor State shall be considered as maintaining:
>
> "(*a*) Any reservation to that treaty made by the predecessor State in regard to the territory to which the succession of States relates;
>
> "(*b*) The consent of the predecessor State expressed, in conformity with the treaty, to be bound by part of the treaty;
>
> "(*c*) The choice of the predecessor State made, in conformity with that treaty, between differing provisions in the application of the treaty.
>
> "2. Notwithstanding paragraph 1, the successor State may however:
>
> "(*a*) Withdraw or modify, wholly or partly, the reservation (paragraph 1 subparagraph (*a*)) or formulate a new reservation, subject to the conditions laid down in the treaty and the rules set out in articles 19, 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties;
>
> "(*b*) Withdraw or modify the consent to be bound by part of the treaty (paragraph 1 subparagraph (*b*));
>
> "(*c*) Alter the choice made between differing provisions in the application of the treaty (paragraph 1 subparagraph (*c*))"

(A/CONF.80/30, para. 118, reproduced in *Documents of the Conference*, A/CONF.80/16/Add.2).

[72] A/CONF.80/16/Add.1, 43rd meeting, para. 11.

[73] A/CONF.80/30, para. 119 (reproduced in *Documents of the Conference*, A/CONF.80/16/Add.2).

[74] A/CONF.80/16/Add.1, 43rd meeting, para. 14 (Poland), para. 15 (United States), para. 18 (Nigeria), para. 19 (Mali), para. 20 (Cyprus), para. 21 (Yugoslavia), para. 22 (Australia) and para. 24 (Swaziland, albeit in more nuanced terms).

[75] A/CONF.80/16/Add.1, 43rd meeting, para. 13 (Poland), para. 16 (France), para. 20 (Cyprus), para. 21 (Yugoslavia) and para. 22 (Australia).

State may formulate reservations.[76] These doubts are confirmed in a passage of the separate opinion annexed by Judge Tomka to the judgment of ICJ of 26 February 2007 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.[77] Indeed, if succession is considered to take place *ipso jure* in cases involving the uniting or separation of States, it is difficult to contend that a successor State may avoid or alleviate its obligations by formulating reservations.

50. This being the case, if a successor State formulates a reservation, it would seem appropriate to make that reservation subject to the legal regime for "late reservations", as provided for in the draft guidelines provisionally adopted so far by the Commission. Pursuant to draft guideline 2.3.1,[78] such a reservation may not be formulated unless none of the other Contracting Parties objects. This solution would have the advantage of placing the successor State in the same legal position that the predecessor State would have been in if it had sought to formulate a reservation after expressing its consent to be bound by the treaty.

51. The *ipso jure* nature of succession, as established in the 1978 Vienna Convention for cases involving the uniting or separation of States, also raises doubts as to whether the successor State may formulate objections to reservations to which the predecessor State had not objected. One author has explicitly denied that such a State may do so.[79]

52. Another question that merits consideration is that of the effects *ratione temporis* of a declaration whereby a successor State other than a newly independent State announces that it is not maintaining a reservation formulated by the predecessor State. Since, under the regime established in part IV of the 1978 Vienna Convention for cases involving the uniting or separation of States, succession to treaties takes place *ipso jure* on the date of the succession of States, such a declaration must necessarily be regarded as a *withdrawal* of the reservation in question and, as such, must be considered subject to the ordinary rules of the law of treaties, as reflected in article 22 of the 1969 Vienna Convention. Pursuant to paragraph 3 (*a*) of that article, "[u]nless the treaty otherwise provides, or it is otherwise agreed[,] the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State".

[76] See, however, Gaja, *loc. cit.* (footnote 13 above), pp. 64–65. While he refers specifically to newly independent States, the author makes observations that he believes can apply to other cases of succession. The author reasons as follows: even if a newly independent State were considered not to be entitled to make a reservation when notifying its succession, one should take the view that such a State may achieve practically the same result by making a partial withdrawal (if such a withdrawal is permitted) to the same extent that may be covered by a reservation. In the author's view, these considerations also apply to cases in which succession is considered not to depend on the acceptance of the treaty by the successor State.

[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007*, separate opinion of Judge Tomka, para. 35:

"*There can be no doubt that this decision to notify of the accession to the Genocide Convention, with a reservation to Article IX and not succession (where no reservation is allowed) was motivated by the considerations relating to the present case*.* It was intended to prevent a claim that Serbia and Montenegro had obligations under the Genocide Convention prior to June 2001 (in particular, substantive obligations in the period of 1992–1995, relevant for the claims of Bosnia and Herzegovina). This decision was also intended to avoid the jurisdiction of the Court under Article IX, not only for that period, but also for the future until the reservation was eventually withdrawn. Bosnia and Herzegovina timely objected to the Federal Republic of Yugoslavia's notification of accession to the Genocide Convention with a reservation to Article IX.

"That single notification of accession, in my view, was totally inconsistent with the succession by the Federal Republic of Yugoslavia—notified the very same day to the United Nations Secretary-General as accession to the Genocide Convention—to the Vienna Convention on Succession of States in Respect of Treaties, which in Article 34 provides that the treaties of the predecessor State continue in force in respect of each successor State. By the latter notification of succession, the Federal Republic of Yugoslavia became a contracting State of the Vienna Convention on Succession of States in Respect of Treaties as of April 1992. That Convention entered into force on 6 November 1996. Although not formally applicable to the process of the dissolution of the former Yugoslavia, which occurred in the 1991–1992 period, in light of the fact that the former Yugoslavia consented to be bound by the Vienna Convention already in 1980, and the Federal Republic of Yugoslavia has been a contracting State to that Convention since April 1992, one would not expect, by analogy to Article 18 of the Vienna Convention on the Law of Treaties, a State which, through notification of its accession, expresses its consent to be considered as bound by the Vienna Convention on Succession of States in Respect of Treaties to act in a singular case inconsistently with the rule contained in Article 34 of that Convention, while in a great number of other cases to acting in full conformity with that rule.

"These considerations, taken together, lead me to the conclusion that the Court should not attach any legal effect to the notification of accession by the Federal Republic of Yugoslavia to the Genocide Convention, and should instead consider it bound by that Convention on the basis of the operation of the customary rule of *ipso jure* succession codified in Article 34 as applied to cases of the dissolution of a State".

[78] See footnote 37 above.

[79] Gaja, *loc. cit.* (footnote 13 above), p. 67: "When, on the contrary, succession is considered to be automatic, the admissibility of objections on the part of the successor State must be ruled out. … If the predecessor State had accepted the reservation, such consent cannot be subsequently revoked either by the same State or by its successor."

Chapter II

Analysis of practice

A. Practice in relation to treaties deposited with the Secretary-General of the United Nations

53. The issue of the succession of States to treaties arose for the Secretary-General, as depositary, from the Organization's very beginnings, in connection with succession to treaties concluded under the auspices of the League of Nations. Newly independent States announced that they were assuming the rights and obligations created by the relevant treaty and that they considered

themselves parties to the treaty.[80] Practice was gradually built up through these notifications of succession. Starting in the 1960s, with the admission of a number of newly independent States to the United Nations (most of which were non-metropolitan territories that had become independent), the practice that had emerged since the 1950s became established. A number of points should be mentioned at the outset:

(*a*) In all cases, the Secretary-General was guided by practical considerations in the exercise of his depositary functions. Accordingly, he did not include a successor State (whether a newly independent State or a State resulting from a uniting or separation of States) in the list of States parties to a treaty deposited with him unless he had received either a notification concerning a particular treaty (most newly independent States deposited such notifications) or a notification accompanied by a list of treaties to which the State concerned was succeeding (as in the case of the Czech Republic and Slovakia);

(*b*) In cases where a notification of succession was silent on the subject of reservations and/or objections, the Secretary-General included the successor State (newly independent or other successor State) in the list of States parties to the treaty without making any mention of the reservations and/or objections formulated by the predecessor State. Exceptions can be found, however, with respect to some successor States of the former Yugoslavia.[81] Moreover, the practice shows that, in the absence of an indication on the part of the successor State concerning reservations formulated by the predecessor State, the Secretary-General does not request clarification on this point, leaving it to States parties to draw the legal conclusions they deem appropriate;

(*c*) Nonetheless, in his reply to the Special Rapporteur's questionnaire,[82] the Chief of the Treaty Section of the United Nations Office of Legal Affairs indicated that "[t]he Secretary-General has encountered difficulties in cases where, upon succession, the successor State makes no mention of the declarations/reservations made by the predecessor State. In these cases the Secretary-General presumes that the successor State is maintaining such declarations/reservations but is unable to take a definitive position". Similarly, in a memorandum addressed to the Regional Representative of the United Nations High Commissioner for Refugees regarding the succession of Jamaica to rights and obligations under the 28 July 1951 Convention relating to the Status of Refugees, the Office of Legal Affairs of the United Nations Secretariat assumed in principle that the reservations previously formulated by the United Kingdom remained applicable to Jamaica;[83]

(*d*) The Secretary-General always mentions any declarations concerning reservations, declarations, objections, etc. (repeating, confirming or amending them) that accompany a notification of succession.

54. Below are some examples that serve as a fairly representative typology of how the question of reservations and objections to reservations has been treated in the context of succession to treaties deposited with the Secretary-General.

1. Reservations

(a) *Successor States that are newly independent States*

55. The practice of newly independent States in relation to reservations in the context of succession to treaties deposited with the Secretary-General has varied widely:

(*a*) In a number of cases, newly independent States have deposited a notification of succession to a particular treaty without making any mention of the question of reservations. In such cases, the Secretary-General has included the newly independent State in the list of States parties to the treaty concerned without passing judgement upon the status of reservations formulated by the predecessor State;[84]

(*b*) Some newly independent States have expressly maintained the reservations formulated by the predecessor State;[85]

(*c*) In other cases, the newly independent State has essentially reformulated the same reservations made by the predecessor State;[86]

(*d*) There have been cases in which the newly independent State has maintained the reservations formulated by the predecessor State while adding new reservations;[87]

(*e*) There have also been cases in which the newly independent State has "reworked" reservations made by the predecessor State;[88]

(*f*) In a few cases, the newly independent State has withdrawn the predecessor State's reservations while formulating new reservations;[89]

(*g*) Lastly, there have been cases in which the newly independent State has formulated new reservations while maintaining those of the predecessor State.[90]

---

[80] This was the case of Pakistan in relation to the Special Protocol concerning Statelessness; see *Multilateral Treaties Deposited with the Secretary-General (Status as at 31 December 2005)* (United Nations publication, Sales No. E.06.V.2), ST/LEG/SER.E/24, vol. II, p. 561.

[81] See paragraph 60 below.

[82] See footnote 2 above.

[83] See United Nations, *Juridical Yearbook 1963*, p. 182: "Jamaica would have the right to avail itself of these reservations which were made by the United Kingdom under the terms of the Convention and it may be that in due course your office will wish to obtain a declaration by Jamaica which would withdraw these reservations. However, we think your main inquiry at present is answered by the conclusion that Jamaica is under the obligations of the Convention subject to the reservations made by the United Kingdom."

[84] See, for example, *Multilateral Treaties Deposited with the Secretary-General*, *op. cit.*, vol. I, chap. IV.2, p. 136 (Solomon Islands). The Solomon Islands succeeded to the International Convention on the Elimination of All Forms of Racial Discrimination without making any mention of the reservations made by the predecessor State (the United Kingdom), which are not reproduced in relation to the Solomon Islands. The same remark may be made in relation to the succession of Senegal and Tunisia to the Convention relating to the Status of Refugees (*ibid.*, chap. V.2, p. 376).

[85] *Ibid.*, chap. V.2, p. 379 and p. 389, footnote 18 (Cyprus); p. 631 (Fiji), p. 390, footnote 21 (Gambia); and vol. II, chap. XVI.1, p. 84 (Solomon Islands).

[86] *Ibid.*, chap. IV.2, pp. 138–139 (Fiji) and chap. V.3, pp. 394–395 (Kiribati).

[87] *Ibid.*, chap. V.3, p. 398, footnote 12 (Lesotho).

[88] *Ibid.*, chap. V.2, pp. 380 and 393 (Fiji).

[89] *Ibid.*, chap. V.3, p. 396 and p. 398, footnote 14 (Zambia).

[90] *Ibid.*, chap. V.3, p. 393 and p. 398, footnote 7 (Botswana).

(b) *Successor States other than newly independent States*

56. In these cases of succession, in particular those of the States that emerged from the former Yugoslavia and Czechoslovakia, the reservations of the predecessor State have been maintained.

57. It should be noted, in this regard, that the Czech Republic,[91] Slovakia,[92] the Federal Republic of Yugoslavia[93] and, subsequently, Montenegro[94] formulated general declarations whereby these successor States reiterated the reservations of the predecessor State.

58. In addition, in some cases the predecessor State's reservations have been expressly confirmed[95] or reformulated[96] by the successor State in relation to a particular treaty.

59. In the case of the Republic of Yemen [united], there was also a repetition of reservations by the successor State. In a letter dated 19 May 1990 addressed to the Secretary-General, the Ministers for Foreign Affairs of the Yemen Arab Republic and the People's Democratic Republic of Yemen communicated the following:

> As concerns the treaties concluded prior to their union by the Yemen Arab Republic or the People's Democratic Republic of Yemen, the Republic of Yemen (as now united) is accordingly to be considered as a party to those treaties as from the date when one of these States first became a party to those treaties. Accordingly the tables showing the status of treaties will now indicate under the designation "Yemen" the date of the formalities (signatures, ratifications, accessions, declarations and reservations, etc.) effected by the State which first became a party, those eventually effected by the other being described in a footnote.[97]

60. Lastly, there is the case of the other successors to the former Yugoslavia (apart from the Federal Republic of Yugoslavia), which appear in the list of successor States to various treaties deposited with the Secretary-General with the indication, in footnotes, of reservations formulated by the former Yugoslavia.[98]

2. Objections to reservations

(a) *Successor States that are newly independent States*

61. At the outset, mention should be made of a number of cases in which a newly independent State confirmed, in notifying its succession, the objections made by the predecessor State to reservations formulated by States parties to the treaty.[99]

62. There have also been a few cases in which objections formulated by the predecessor State have been withdrawn and, at the same time, new objections have been formulated.[100]

(b) *Successor States other than newly independent States*

63. In the case of the successor States to Czechoslovakia, objections made by the predecessor State to reservations formulated by other States parties were explicitly maintained by Slovakia.[101] Similarly, the Federal Republic of Yugoslavia stated that it maintained the objections made by the former Yugoslavia,[102] and Montenegro stated that it maintained the objections made by Serbia and Montenegro.[103]

B. Practice in relation to treaties deposited with other depositaries

64. The practice concerning these other treaties provides little guidance on the question of reservations and objections to reservations in the context of succession of States. The few elements that have been identified do not tend to contradict the lessons that can be drawn from the practice in relation to treaties for which the United Nations Secretary-General serves as depositary.

65. As to the status of reservations formulated by the predecessor State, it should first be noted that the Czech

---

[91] *See* https://treaties.un.org/Pages/Historicalinfo.aspx#"Czech%20Republic". In a letter dated 16 February 1993 addressed to the Secretary-General and accompanied by a list of multilateral treaties deposited with the latter, the Czech Republic stated, among other things: "In conformity with the valid principles of international law and to the extent defined by it, the Czech Republic, as a successor State to the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e., the date of the dissolution of the Czech and Slovak Federal Republic, by multilateral international treaties to which the Czech and Slovak Federal Republic was a party on that date, including reservations and declarations to their provisions made earlier by the Czech and Slovak Federal Republic".

[92] *See* https://treaties.un.org/Pages/Historicalinfo.aspx#"Slovakia". Slovakia declared, in a letter dated 19 May 1993 addressed to the Secretary-General and accompanied by a list of multilateral treaties deposited with the latter: "In accordance with the relevant principles and rules of international law and to the extent defined by it, the Slovak Republic, as a successor State, born from the dissolution of the Czech and Slovak Federal Republic, considers itself bound, as of 1 January 1993, i.e., the date on which the Slovak Republic assumed responsibility for its international relations, by multilateral treaties to which the Czech and Slovak Federal Republic was a party as of 31 December 1992, including reservations and declarations made earlier by Czechoslovakia, as well as objections by Czechoslovakia to reservations formulated by other treaty-parties."

[93] *See* https://treaties.un.org/Pages/Historicalinfo.aspx#"Yugoslavia". The notification of 8 March 2001 addressed to the Secretary-General by the Federal Republic of Yugoslavia contained the following indication: "The Government of the Federal Republic of Yugoslavia maintains the signatures, reservations, declarations and objections made by the Socialist Federal Republic of Yugoslavia to the treaties listed in the attached annex 1, prior to the date on which the Federal Republic of Yugoslavia assumed responsibility for its international relations."

[94] See https://treaties.un.org /Pages/HistoricalInfo.aspx?#"Montenegro". In a letter dated 10 October 2006, accompanied by a list of treaties deposited with the Secretary-General, Montenegro indicated that it would maintain "… the reservations, declarations and objections made by Serbia and Montenegro" in relation to the treaties concerned.

[95] *Multilateral Treaties Deposited with the Secretary-General*, *op. cit.*, vol. I, chap. VI.16, p. 448 (Serbia and Montenegro).

[96] *Ibid.*, chap. IV.11, p. 340, footnote 39 (Slovenia, which withdrew this reservation in 2004).

[97] *See* https://treaties.un.org/Pages/Historicalinfo.aspx#"Yemen".

[98] *Ibid.*, for example, vol. I, chap. VI.11, p. 335, footnote 3; chap. IV.16, p. 448, footnote 2; and chap. VI.17, p. 454, footnote 3; see also vol. II, chap. XVIII.5, p. 114, footnote 2; chap. XXI.4, p. 306, footnote 1; and chap. XXII.1, pp. 370–371, footnote 2.

[99] *Ibid.*, vol. I, chap. III.3, p. 95 (Malta), which repeated, upon succession, some objections formulated by the United Kingdom; *ibid.*, p. 97 (Tonga), which indicated that it "adopted" the objections made by the United Kingdom respecting the reservations and statements made by Egypt; vol. II, chap. XXI.1–XXI.2, pp. 292 and 298 (Fiji); and chap. XXI.4, p. 293 and p. 306, footnote 6 (Tonga).

[100] *Ibid.*, vol. II, chap. XXI.2, p. 298 (Fiji) and p. 299 (Tonga).

[101] See footnote 92 above.

[102] See footnote 93 above.

[103] See footnote 95 above.

Republic and Slovakia transmitted to a number of depositaries notifications of succession similar to those transmitted to the Secretary-General of the United Nations and providing for the maintenance of reservations formulated by the predecessor State.[104] Neither the depositaries in question nor the other States parties to the treaties concerned raised any objections to this practice.

66. On the issue of whether or not a successor State should be presumed to maintain reservations made by the predecessor State, the reply of the Universal Postal Union to the Special Rapporteur's questionnaire is worth mentioning.[105] That organization's practice is to consider that valid reservations applicable to a member State are automatically transferred to the successor State; the same is true in the case of States that have become independent by separating from a member State.

67. The Council of Europe applied the same presumption with respect to Montenegro. In a letter dated 28 June 2006 addressed to the Minister for Foreign Affairs of Montenegro, the Director General of Legal Affairs of the Council of Europe indicated that, in accordance with article 20 of the 1978 Vienna Convention, the Republic of Montenegro was considered "as maintaining these reservations and declarations because the Republic of Montenegro's declaration of succession does not express a contrary intention in that respect".[106] That letter also included a list of reservations and declarations that had been revised in places to remove references to the Republic of Serbia. By a letter dated 13 October 2006, the Minister for Foreign Affairs of Montenegro communicated his agreement on the wording of those reservations and declarations, as adapted by the depositary.

68. The practice followed by Switzerland as depositary of a number of multilateral treaties likewise does not reveal any fundamental contradiction with that of the Secretary-General of the United Nations. It is true that Switzerland had initially applied, to a successor State that made no reference to the status of the predecessor State's reservations, the presumption that such reservations were not maintained. Today, however, Switzerland no longer applies any presumption, as its practice is to invite the successor State to communicate its intentions as to whether or not it is maintaining reservations formulated by the predecessor State.[107]

69. Lastly, on the capacity of a successor State to formulate new reservations, it should be noted that the Council of Europe, in its letter to Montenegro of 28 June 2006,[108] took the position that that State was not entitled to make new reservations to treaties to which it had notified its succession.[109] This position seems to be consistent with the rule of *ipso jure* succession to treaties, as set out in the 1978 Vienna Convention for cases involving the uniting or separation of States.

---

[104] See Václav Mikulka, "The dissolution of Czechoslovakia and succession in respect of treaties", in *Succession of States*, Mojmir Mrak, ed., The Hague/London/Boston, Nijhoff, 1999, pp. 111–112.

[105] See footnote 2 above.

[106] JJ55/2006, PJD/EC.

[107] See the letter dated 3 May 1996 from the Directorate of Public International Law addressed to an individual, describing the practice of Switzerland as depositary State for the Geneva Conventions of 12 August 1949 for the Protection of Victims of War, in relation to the succession of States to treaties; reproduced in *Revue suisse de droit international et de droit européen*, 1997, 7th year, pp. 683–685, especially p. 684. This approach was confirmed in an opinion given on 6 February 2007 by the Directorate of Public International Law of the Federal Department of Foreign Affairs, entitled "Pratique de la Suisse en tant qu'Etat dépositaire: réserves aux traités dans le contexte de la succession d'Etats", reproduced in *Jurisprudence des autorités administratives de la Confédération (JAAC)*, 5 December 2007 edition, pp. 328–330, especially p. 330 (available from www.bk.admin.ch/dokumentation/02574/02600/index.html?lang=fr).

[108] See footnote 106 above.

[109] "[T]he Republic of Montenegro does not have the possibility, at this stage, to make new reservations to the treaties already ratified."

Annex

Selected bibliography

I. Treaties

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

Vienna Convention on Succession of States in respect of Treaties (Vienna, 23 August 1978), *ibid.*, vol. 1946, No. 33356, p. 3.

Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 21 March 1986), A/CONF.129/15 (not yet in force).

II. International conferences

Official Records of the United Nations Conference on Succession of States in Respect of Treaties. Vienna, 4 April–6 May 1977 and 31 July–23 August 1978, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* [1977 session], A/CONF.80/16, United Nations publication, Sales No. 78.V.8; vol. II, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* [resumed session, 1978], A/CONF.80/16/Add.1, United Nations publication, Sales No. 79.V.9; and vol. III, *Documents of the Conference*, A/CONF.80/16/Add.2, United Nations publication, Sales No. 79.V.10.

III. International case law

International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007*, and separate opinion of Judge Tomka.

IV. Documents of the International Law Commission

Third report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur, *Yearbook ... 1970*, vol. II, document A/CN.4/224 and Add.1, pp. 25–60.

First report on succession of States in respect of treaties, by Sir Francis Vallat, Special Rapporteur, *Yearbook ... 1974*, vol. II (Part One), document A/CN.4/278 and Add.1–6.

Questionnaires prepared by the Special Rapporteur on the topic of reservations to treaties, in accordance with paragraph 489 of the report of the Commission on the work of its forty-seventh session, *Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1, annexes II and III, pp. 97 and 107 respectively.

V. Practice of treaty depositaries

Multilateral Treaties Deposited with the Secretary-General (Status as at 31 December 2005), vols. I and II, United Nations, ST/LEG/SER.E/24.

Letter dated 3 May 1996 from the Directorate of Public International Law addressed to an individual, describing the practice of Switzerland as depositary State for the Geneva Conventions of 12 August 1949 for the protection of victims of war, in relation to the succession of States to treaties; reproduced in *Revue suisse de droit international et de droit européen*, 1997, 7th year, pp. 683–685.

Opinion of the Directorate of Public International Law of the Federal Department of Foreign Affairs of Switzerland, entitled "Pratique de la Suisse en tant qu'Etat dépositaire: réserves aux traités dans le contexte de la succession d'Etats", given on 6 February 2007 and reproduced in *Jurisprudence des autorités administratives de la Confédération (JAAC)*, 5 December 2007 edition, pp. 328–330, especially p. 330 (www.bk.admin.ch/dokumentation/02574/02600/index.html?lang=fr).

Letter dated 28 June 2006 from the Director General of Legal Affairs of the Council of Europe addressed to the Minister for Foreign Affairs of Montenegro, JJ55/2006, PDJ/EC.

VI. Doctrine

A. Books

BOKOR-SZEGÖ, Hanna

New States and International Law. Budapest, Akadémiai Kiadó, 1970.

GONÇALVES PEREIRA, André

La succession d'Etats en matière de traités. Paris, Pedone, 1969.

IMBERT, Pierre-Henri

Les réserves aux traités multilatéraux. Evolution du droit et de la pratique depuis l'avis consultatif donné par la Cour internationale de Justice le 28 mai 1951. Paris, Pedone, 1979.

MARCOFF, Marco G.

Accession à l'indépendance et succession d'Etats aux traités internationaux. Fribourg, Editions universitaires, 1969.

O'CONNELL, Daniel Patrick

State Succession in Municipal Law and International Law. Cambridge Studies in International and Comparative Law, VII (Vol. II: International relations). Cambridge, Cambridge University Press, 1967. 592 p.

B. Articles

GAJA, Giorgio

"Reservations to treaties and the newly independent States", *Italian Yearbook of International Law*, vol. 1, 1975, pp. 52–68.

KLABBERS, Jan

"State succession and reservations to treaties", in *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, Jan KLABBERS and René LEFEBER, eds. The Hague, Martinus Nijhoff, 1998, pp. 107–120.

MENON, P. K.

"The newly independent States and succession in respect of treaties", in *Korean Journal of Comparative Law*, vol. 18, 1990, pp. 139–173.

MIKULKA, Václav

"The dissolution of Czechoslovakia and succession in respect of treaties", in *Succession of States*, Mojmir MRAK, ed., The Hague, Martinus Nijhoff, 1999, pp. 100–125.

RUDA, J. M.

"Reservations to treaties", *Collected Courses of The Hague Academy of International Law, 1975–III*. Vol. 146. The Hague, Martinus Nijhoff, 1975, pp. 95–218.

SZAFARZ, Renata

"Vienna Convention on Succession of States in respect of Treaties: a general analysis", *Polish Yearbook of International Law*, vol. X, 1979–1980, pp. 77–113.

ZEMANEK, Karl

"State succession after decolonization", *Collected Courses of The Hague Academy of International Law, 1965–III*. Vol. 116. The Hague, Martinus Nijhoff, 1965, pp. 181–300.